

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protest of:)	
)	CASE NO.: 2008-148
Fitness LifeStyles)	
)	
University of South Carolina)	POSTING DATE:
IFB No. USC IFB-1339-DH)	
Furnish, Deliver & Install Fitness)	DECEMBER 1, 2008
<u>Equipment @ USC Upstate</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Fitness LifeStyles. With this invitation for bids (IFB), the University of South Carolina (USC) attempts to procure fitness equipment for a new wellness center at the USC Upstate campus. In the letter, Fitness Lifestyles protested USC's intent to award to Wilkins Fitness LLC, dba Charleston Fitness Equipment (Wilkins), alleging, "After reviewing the statement of award per (LOT C), I discovered that our company, Fitness LifeStyles had submitted a proposal/quote for \$9,848.40 less than Wilkins Fitness LLC, which is currently the potential award winner."

After notice to all parties and in order to resolve the matter, the CPO conducted a hearing November 17, 2008. Appearing before the CPO were Wilkins Fitness LLC dba Charleston Fitness Equipment, represented by Michele and Dan Wilkins and USC, represented by George Lampl, Esq. Fitness LifeStyles gave notice that it did not intend to appear at the hearing.

NATURE OF PROTEST

The protest letter is attached and incorporated herein.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On September 11, 2008, USC issued the IFB. [Ex. 1] The IFB asked prospective bidders to offer on three lots, Lot A – Lot C. Each lot contained numerous items, as follows: Lot A - 23 line items of strength equipment machines, plus a 24th line item for shipping, inside delivery, installation and performance check; Lot B - 17 lines items of free weight equipment, plus an 18th item for shipping, inside delivery, installation and performance check; and Lot C – 7 line items of cardiovascular equipment, plus an 8th line item for shipping, inside delivery, installation and performance check. The IFB specified that awards would be determined by lot based upon the lowest total cost for each lot.

2. On September 18, 2008, USC closed the question and answer period. No amendment was issued to the IFB.
3. On October 3, 2008, USC opened the bids relevant to this decision as follows:

<u>Bidder</u>	<u>Bid Amount</u>
Lot C	
• Fitness Lifestyle	\$104,646.10
• Wilkins Fitness	106,638.40
• Inovative Fitness	118,472.90
• Fitness Resource	125,460.00
• USA Fitness	174,142.56

4. On October 17, 2008, after rejecting Fitness LifeStyle's bid as nonresponsive, USC posted notices to award Lot A to Wilkins, Lot B to Sportime, and Lot C to Wilkins.
5. On October 29, 2008, the CPO received a protest from Fitness Lifestyles for Lot C.

MOTION TO DISMISS

At the beginning of the hearing, USC offered a motion to dismiss the protest of Fitness LifeStyles on the grounds that it was untimely filed. USC argued that it posted its notice of award at <http://purchasing.sc.edu> on October 17, 2008, but that Fitness LifeStyles did not file its protest with the CPO until October 29, 2008 in violation of SC Code section 11-35-4210. Since Fitness LifeStyles did not attend the hearing, the ruling on the motion is based entirely on facts presented by USC and a review of the procurement file.

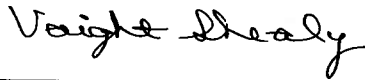
DETERMINATION

The record reflects that USC posted its notice of award on October 17, 2008¹ and that Fitness LifeStyles thereafter submitted its protest, which was dated October 28, 2008, on October 29, 2008, when it was received by the CPO. Regarding the filing of a protest of an award, the Consolidated Procurement Code reads:

(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract. [11-35-4210(b)]

The CPO finds that Fitness LifeStyles did not file its protest in a timely manner according to the statute above.

The Procurement Review Panel has ruled consistently that the issue of timeliness is one of jurisdiction and cannot be waived, even by mutual consent of the parties. Protest of Vorec Corporation, Case No. 1994-9 (holding that timeliness is jurisdictional). Therefore, the CPO must grant the Motion of USC and dismiss the protest as untimely filed.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

December 1, 2008

Date

Columbia, S.C.

¹ The Code requires that agencies announce dates that they anticipate posting awards. It reads "notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location specified in the invitation for bids. For contracts with a total or potential value in excess of fifty thousand dollars but less than one hundred thousand dollars, notice of the award of a contract must be given by posting and must be sent to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. For contracts with a total or potential value of one hundred thousand dollars or greater, notice of an intended award of a contract must be given by posting the notice for ten days before entering into a contract and must be sent to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. The posting date shall appear on the face of all these notices." [11-35-1520(10)] The regulations supporting this requirement read further, "The procurement officer shall issue the notice of intent to award or award on the date specified in the solicitation, unless the procurement officer determines, and gives notice, that a longer review time is necessary. The procurement officer shall give notice of a time extension to each bidder by posting it at the location identified in the solicitation." [19-445.2090(B)] The record reflects that the solicitation announced that the award would be posted October 3, 2008 at the website address <http://purchasing.sc.edu>. In fact, USC posted the award at <http://purchasing.sc.edu> on October 17, 2008, not October 3. However, USC posted a notice of award extension October 3, 2008 extending the award indefinitely. [Ex. 3] USC officials testified that they sent emails to all bidders including Fitness LifeStyles on October 17, 2008 to announce that they would be posting the award on that date. Officials from Wilkins and Fitness Resources, another bidder in attendance, confirmed receipt of USC's emailed notice of posting. Therefore, it is determined that USC gave actual notice on October 17, 2008 of the revised posting date.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



11-14-08

South Carolina Budget & Control Board
Procurement Services Division
C/o R. Voight Shealy
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

Dear Mr. Shealy:

I am writing in correspondence with Case Number 2008-147 & 2008-148, in the matter of protest per IFB NO.; USC-IFB-1339-DH. Unfortunately I am unable to attend the hearing stated for Monday, November 17th, 2008 at 10:30 A.M. As mentioned in my previous letter of protest dated 10-28-08, Fitness LifeStyles has proposed equipment for Lot "C" that include equal or better specifications that is currently listed per this IFB.

At this juncture, I understand the intent to award LOT "C" to Wilkins Fitness LLC has been stated in the documents provided to Fitness LifeStyles.

Please take time to review and compare the equipment and specifications provided by Fitness LifeStyles and Wilkins Fitness LLC per LOT "C". Fitness LifeStyles has proposed equipment that is Full Commercial Grade, built for heavy commercial usage, and includes a premier warranty package. That being said, the University will save \$9,848.40 and receive top quality commercial fitness equipment.

We are asking you to reconsider and award this project to Fitness LifeStyles Inc. Please contact me to further discuss the details about the equipment, specifications, and how our company is looking forward to a potential long term business relationship with the University of South Carolina Upstate.

Sincerely,

Ric Flagg
Vice President, Business Development

614 Cookman Ave • Asbury Park, NJ 07712
732.775.1630 • fax: 732.775.1266

www.fitnesslifestyles.com



10-28-08

University of South Carolina
C/o Michael B. Spicer
4430 Broad River Road
Columbia, SC 29210

Subject: Solicitation# USC-IFB-1339-DH – Furnish, Delivery and Install New Fitness Equipment at USC Upstate.

Dear Michael:

After reviewing the statement of award per (LOT C), I discovered that our company, Fitness LifeStyles had submitted a proposal/quote for \$9,848.40 less than Wilkins Fitness LLC, which is currently the potential award winner.

We are confident that the equipment proposed by Fitness Lifestyles meet or exceed the specifications listed for LOT C. In turn, we are the lowest responsible bidder that has met the qualified specifications per this solicitation.

At this juncture, Fitness LifeStyles is currently contesting the potential award presented to Wilkins Fitness for LOT C.

Please contact me at your earliest convenience to discuss the details about the protest at hand.

Sincerely,

Ric Flagg
VP Business Development

614 Cookman Ave • Asbury Park, NJ 07712
732.775.1630 • fax: 732.775.1266

www.fitnesslifestyles.com